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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1177

Filed: 15 August 2017

Mecklenburg County, No. 07-CVD-314

AMY S. GRISSOM, Plaintiff,

v.

DAVID I. COHEN, Defendant.

Appeal by Plaintiff from order entered 17 August 2016 by Judge Matthew J. Osman in Mecklenburg County District Court. Heard in the Court of Appeals 20 April 2017.

*James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Jonathan D. Feit, for the Plaintiff-Appellant.*

*H. Stephen Robinson, Kevin L. Miller, and Tom Bush, for the Defendant-Appellee.*

DILLON, Judge.

Amy S. Grissom (“Plaintiff-Mother”) appeals from an order denying her motion for contempt. For the following reasons, we reverse and remand.

I. Background

The parties in this case (hereinafter “Mother” and “Father”) have been involved in considerable custody litigation since 2008 concerning their son (“Son”) and their daughter (“Daughter”).

In September 2014, the trial court entered a modification of the existing custody order (the “Modification”), which allowed Father to have greater visitation time with the two children.

In December 2015, when Son was seventeen (17) and Daughter was fourteen (14), the children often refused to return to Mother after completing visitation with Father. Son turned eighteen (18) in April 2016. Mother filed a motion for civil and criminal contempt in June 2016, arguing that Father was in willful violation of the Modification by keeping the children during Mother’s designated custodial time. At the 28 June 2016 show cause hearing, the trial court did not allow Mother to proceed on *both* civil *and* criminal contempt, requiring Mother to choose to pursue either civil *or* criminal contempt. Accordingly, Mother chose to proceed on her civil contempt motion against Father. After a hearing on the matter, the trial court entered an order concluding that Father was not in civil contempt of the Modification. Mother timely appealed.

## II. Analysis

Mother makes two arguments on appeal: first, she argues that the trial court erred in failing to find Father in civil contempt; second, she argues that the trial court

erred in not allowing her to proceed on her criminal contempt motion. We address each argument in turn.

A. Civil Contempt

We review an order denying a motion for civil contempt only to “[determine] whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Thompson v. Thompson*, 223 N.C. App. 515, 518, 735 S.E.2d 214 (2012).

The trial court may find a party in continuing civil contempt for failure to follow a court order pursuant to N.C. Gen. Stat. § 5A-21, which provides, in relevant part:

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order;

(2a) The noncompliance by the person to whom the order is directed is willful; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2015).

One cannot be found in contempt of an order unless the trial court makes a determination that the party’s violation of the order was “willful.” *Lamm v. Lamm*,

229 N.C. 248, 249, 49 S.E.2d 403, 404 (1948). Here, the trial court denied Mother’s motion for civil contempt based on its finding that it had “entered previous Orders regarding child custody” and its determination that Father had not “*willfully* violated the previous custody orders” at the time of the hearing.<sup>1</sup> (Emphasis added.)

Evidence was presented at the hearing which supports the trial court’s determination that Father was not in *willful* violation of the previous custody orders, namely, evidence that Father did not force or encourage the children to stay with him but that they simply refused to go with Mother. *See McKinney v. McKinney*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 799 S.E.2d 280, 284 (2017) (holding that a parent is not in *willful* violation of a custody order where teenage children refuse to leave at the end of the visitation time and the parent otherwise does not force or encourage the children to stay); *Hancock v. Hancock*, 122 N.C. App. 518, 522-23, 471 S.E.2d 415, 418 (1996) (stating that “there must be a showing that the custodial parent deliberately interfered with or frustrated the [other] parent’s visitation before the custodial parent’s actions can be considered willful”). We note that there was also evidence presented which would *support* a determination that Father’s actions were willful. It is the trial court, however, and not our Court, which is “entrusted with the duty

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<sup>1</sup> We note that the trial court properly declined to consider Mother’s civil contempt motion as to Son because Son was eighteen (18) at the time of the hearing. Thus, no action of Father toward Son, or lack of action, could have been a basis of finding Father in civil contempt.

to . . . weigh and resolve any conflicts in the evidence [and] find the facts[.]” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (2015).

The trial court’s order, though, is devoid of any specific factual findings regarding Father’s actions concerning the issue of Father’s willfulness. In order for us to conduct any meaningful review of the trial court’s determination regarding Father’s willfulness, we must know what facts the trial court found to make that ultimate finding. *See Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007). Therefore, we remand the matter and direct the trial court to enter specific factual findings regarding whether Father’s actions were willful. For instance, if the trial court enters findings that Father did not force or encourage his children to stay with him during Mother’s time with the children, such findings would support the trial court’s ultimate finding that Father did not act willfully, and the trial court would not be required to hear any additional evidence on the matter.<sup>2</sup>

However, if the trial court finds that Father *did* force or encourage his children to stay, such a finding would support a determination that Father acted willfully, whereupon the trial court should consider additional evidence to determine if Father is *currently* in willful violation of an order of the trial court.

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<sup>2</sup> Of course, Mother is free to file a *new* show cause motion for civil contempt with the trial court, where new evidence may be offered, if she has reason to believe that Father is currently in willful violation of an order of the trial court.

We direct the trial court to make the additional findings required by N.C. Gen. Stat. § 5A-23(e), which requires the trial court to make specific findings concerning *each* of the elements of civil contempt set forth in the statute. N.C. Gen. Stat. § 5A-23(e) provides:

At the conclusion of the [contempt] hearing, the judicial official *must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a)*. If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.

N.C. Gen. Stat. § 5A-23(e) (2015) (emphasis added).

Here, the trial court determined that Father did not act willfully, deciding the element codified in N.C. Gen. Stat. § 5A-21(a)(2a) in Father’s favor. This finding supports the trial court’s decision not to hold Father in civil contempt. However, because N.C. Gen. Stat. § 5A-23(a) requires that the trial court “*must*” enter a finding regarding “*each*” of the four elements set out in N.C. Gen. Stat. § 5A-21(a), we remand for the trial court to enter an order – based on the evidence presented during the previous show cause hearing – to include more specific findings as to Father’s willfulness and the findings required by N.C. Gen. Stat. § 5A-21(a), whether for or against Father.

#### B. Criminal Contempt

Mother also filed a motion contending that Father was in *criminal* contempt for violating the custody order regarding Son's visitation prior to Son turning eighteen (18). Prior to the contempt hearing, the trial court stated that it usually required the party seeking the contempt order to "elect at the beginning of the hearing which [type of contempt] they want to [pursue]." Mother stated that she wanted to present arguments in support of her right to pursue both civil *and* criminal contempt in the same contempt proceeding; however, the trial court indicated that it was unlikely to consider both at the same hearing. At the contempt hearing, the trial court asked Mother to decide whether she was seeking civil or criminal contempt, and Mother, without objection, stated "civil."

On appeal, Mother contends that the trial court's requirement that she pursue either civil contempt *or* criminal contempt was error.

Civil contempt differs from criminal contempt. Criminal contempt considers a violation of an order which occurred in the past, where the purpose of the proceeding is to punish the offender. *Mauney v. Mauney*, 268 N.C. 254, 256, 150 S.E.2d 391, 393 (1966). Civil contempt considers a violation that is presently occurring and ongoing, where the purpose of the proceeding is to compel the offender to obey. *Id.*

The record indicates that the trial court allowed Mother to pursue either criminal or civil contempt, but not both, because pursuing both in the same hearing would be "unnecessarily complicated." The trial court did not indicate that it would

refuse to allow Mother to pursue criminal contempt against Father in a separate hearing, just that it would not allow Mother to pursue both at the same hearing. In any event, Mother did not properly preserve this issue for our review because she did not make any argument or objection when asked to choose between civil or criminal contempt at the beginning of the civil contempt hearing. *See* N.C. R. App. P. 10(a)(1) (stating that in order to preserve an issue for appellate review, “a party must have presented to the trial court a timely [objection] stating the specific grounds for the [desired] ruling . . .” and “obtain a ruling upon the [objection]”).

### III. Conclusion

We reverse the trial court’s order regarding civil contempt and remand the matter to allow the trial court to enter specific factual findings concerning the issue of Father’s willfulness and to enter findings to comply with N.C. Gen. Stat. § 5A-23(e). If the trial court makes factual findings which *support* an ultimate finding that Father acted willfully, then the trial court may consider new evidence to determine if Father remains in civil contempt which requires purging.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).